

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S REPLY  
BRIEF**



76-7386

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

Docket Nos. 76-7386, 76-7393, 76-7417 and 76-7446

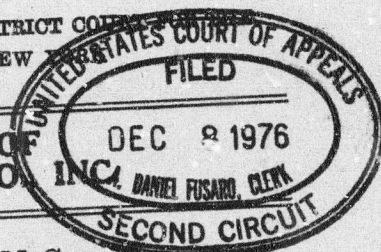
VANA TRADING CO., INC.,  
*Plaintiff-Appellee-Cross-Appellant,*  
*against*

S.S. "METTE SKOU", her engines, boilers, etc., and  
FLOTA MERCANTE GRANCOLOMBIANA, S.A.,  
*Defendant-Third-Party*  
*Plaintiff-Appellant-Appellee,*  
*against*

OVE SKOU and INTERNATIONAL TERMINAL  
OPERATING CO., INC.,  
*Third-Party Defendants-Appellees-  
Cross-Appellants.*

APPEALS FROM THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

**REPLY BRIEF OF  
VANA TRADING CO., INC.**



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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

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**REPLY BRIEF OF PLAINTIFF  
VANA TRADING CO., INC. AS CROSS-APPELLANT**

**I**

The Trial Court found as a fact that the plaintiff had carried its burden of proof of good order and condition on shipment,

“\*\*\*since the preponderance of the credible evidence, including the testimony of experts and others who inspected the yams in New York, as well as the proof concerning the condition and handling of the yams

in Colombia, demonstrated that the damage suffered by the cargo was caused by the conditions to which it was subjected in transit, and not by any inherent defects." (A. 16a)

The Trial Court also found as a fact that the damage in transit was not wholly related to the packaging, and was due to circumstances created or contributed to by the charterer, Flota. (A. 17a)

Plaintiff Vana's cross-appeal is addressed to the point that the lower court erroneously applied the collision damage rule of *Reliable Transfer* rather than the rule of *The Vallescura* to the facts found.

Defendant Flota is in tacit agreement with the applicability of the rule of *The Vallescura* to the facts of the case at bar, since its entire response to Vana's cross-appeal and Flota's reliance on *The Neil Maersk* (Reply of Flota, page 2), is wholly based on the assumption that the trial court's finding of good order at the time of shipment is clearly erroneous. As the trial court's finding of good order is supported by substantial evidence, the rule of *The Vallescura* should have been applied, rather than the finding of *The Neil Maersk*, as advocated by appellant Flota.

The trial court also found that as between the various circumstances created or contributed to by charterer and shipper, any by itself would probably not have caused the damage. (A. 17a)

If this court is in agreement with the trial court's findings of fact, perforce plaintiff Vana should prevail, since the allocation of loss was not established with certainty by defendant Flota.

## II

Appellant Flota cites *S. M. Wolff Co. v. The S. S. Exiria*, 200 F.Supp. 809 (S.D.N.Y. 1961), in rebuttal of plaintiff Vana's argument that Flota had knowledge of

the packing and accepted same without objection. *The Exiria* is inapposite to plaintiff's point, however. In *The Exiria*, the shipment of boxed fig paste was coming apart at the seams even before loading. The bills of lading were claused "Cartons stained by contents." Upon that, and other evidence, the Court very simply found that libellant had not sustained its initial case of proof of good order on shipment.

Throughout the course of the instant appeal, the forest has been concealed by the trees.

There is no question of "special" stowage being required here. The packaging was utterly normal and traditional. Plaintiff's point has always been that the stowage 13 tiers high, in deep tanks, with "a measure of heat", was not normal stowage for Colombian yams.

The sufficiency of the packing cannot be viewed in a vacuum, but must balance against the carrier's non-delegable duty to properly stow and carry the cargo. The cargo was improperly stowed and carried, as was found by the Court below, and therefore the packing, which historically was sufficient to endure the *ordinary* hazards of transport should not be blamed.

As defendant-appellant Flota's own surveyor (not produced as a witness at the trial) states:

"The pattern of damage in stow indicated a condition caused by cargo heat due to inadequate ventilation. There was little damage to the Yams stowed in the top tiers because they apparently had received some ventilation from the manholes and service pipes but the air was not of sufficient force to reach the lower parts of the stows and thus heating occurred with consequent deterioration and the condition reached its most advanced stages in cartons stowed in or near the bottoms of the tanks.

The plywood walkboard platforms were also a factor in the damage. While the platforms provide



excellent working surfaces and reduce crushing, in this instance they impeded air penetration and blocked the flow of gases and heat from the cargo.

\*\*\* Yams are normally carried from South America in open stow during warm weather months without any undue affect\*\*\*." (Plaintiff's Exhibit 8, A. 357a-358a).

### III

I.T.O. has raised the ineffectual ploy of claiming that Vana released it for any damages caused on the pier. (I.T.O. Brief, pages 6-7). The I.T.O. civil action referred to, filed in the New York City Civil Court, was brought for failure to pay for dock loading services. The Vana counterclaim was lodged for Vana's expenses for trucks brought to the pier but not loaded. The Vana Release, Exhibit H-5, Appendix page 448a, clearly states:

"This release is intended solely to release all claims for damages consisting of administrative and trucking expenses incurred by Vana\*\*\*."

And Vana does not claim in the case at bar, for any of its extraordinary trucking expenses due to those trucks not being loaded by I.T.O.; nor is there any indirect claim made through Flota, for those expenses.

### IV

In attempting to obtain the best of all possible worlds, the appellant Flota has castigated the bona-fide purchaser plaintiff for the shipper's use of the normal, customary packaging; has glossed over the use of deep tank stowage when such deep tank stowage is clearly improper and led to the damage; has repeated ad nauseum that the yams were not in good order on shipment when the trial court has found them good; and at the same time has attempted

to shift all blame for the use of the deep tanks and the resulting damage to defendant appellee Skou whose officers were the prime culprits in the stowage, without acknowledging that those officers were, under the terms of the Charter Party, the servants of Flota for purposes of stowage. The trial court found that both stowage and heat were causative factors in the damage.

Plaintiff Vana vigorously disputes any contention that the packing was insufficient. But even if the packing was insufficient, the finding of concurrent fault on the part of the defendant Flota forced upon it the burden of separation, a burden which it did not sustain.

### CONCLUSION

The judgment of the Trial Court should be affirmed or, in the alternative, should be modified to the extent of granting Vana its total loss of \$78,358.50.

Dated: New York, New York  
December 8, 1976

Respectfully submitted,

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**RENATO C. GIALLORENZI**

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**HILL, RYKINS, CAREY, LIESBING & O'BRIEN**

